ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98

REPLY COMMENTS OF TIME WARNER CABLE

Gardner F. Gillespie
Cindy D. Jackson
HOGAN & HARTSON
555 13th Street N.W.
Washington, D. C. 20004

Attorneys for Time Warner Cable

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SUMMARY

Predictably, the utilities' comments in this proceeding are one-sided and unsupported by fact. They urge additional "accuracy" -- that is to say, complexity -- but only to increase the pole attachment rate. They re-argue fundamental issues decided and confirmed more than a decade ago. They propose to add scores of new computations to the pole attachment formula without any record support for their proposals. They suggest that the Commission permit them discretion as to how to calculate rates and to conduct cost studies. They argue that rates should be subject to "negotiation," as if cable operators had reasonable alternatives and the utilities were not monopoly owners of poles.

In short, the utilities want to reopen all the issues that this Commission has long since put to rest. Congress made it clear when the Pole Attachment Act was enacted that the Commission's procedures should be "simple and expeditious." Over years of rulemakings, reconsiderations, and other reviews, the Commission followed Congress' prescription. We respectfully request that the Commission reaffirm its long settled pole attachment formula.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

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Amendment of Rules and	)	CS Docket No. 97-98
Policies Governing Pole	)	
Attachments	)	

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., submits these Reply Comments to the Comments submitted by other parties in this proceeding.

I. THE COMMISSION MUST RESIST THE UTILITIES' CALLS FOR UNSETTLING NOW-SETTLED ASPECTS OF THE FORMULA

A. There is no Basis for Revising the Formula in Fundamental Respects.

As we feared, 1/ the owners of utility poles have used this rulemaking to argue for wholesale reexamination and revision of the Commission's pole attachment rate methodology. The utilities argue that "Congress has mandated that this is an appropriate time for the Commission to

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1/ *See* Comments of Time Warner Cable, June 27, 1997, at 4 (hereinafter Time Warner Comments).

take a hard look at its pricing guidelines for access to electric utility facilities and to consider them afresh in light of current policy considerations." 2/ They urge reliance on "negotiation" and "market forces," 3/ and maintain that," [i]n fact, there is a robust "market" - efficient and equitable - which has made available poles, ducts, conduits, and other infrastructure assets for use by telecommunications providers." 4/ Not surprisingly, these statements are served up without reference or support, because they are plainly false.

Congress assuredly did not suggest that the Commission should reevaluate the pole attachment rate methodology for cable television attachments that has worked for almost two decades. Nor is there any reason to believe that there is a competitive market for pole attachments or that negotiations alone will produce reasonable pole attachment rates. It is obvious to anyone looking up while driving down the street that there remains only one, or occasionally two sets of utility poles in any area. Whether utility poles are an "essential facility" as that term is used in anti-trust law is beside the point. 5/ It is indisputable that the pole

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2/ Joint Comments of the Electric Utilities Coalition, June 27, 1997, at 9 (hereinafter Electric Coalition Comments).

3/ Comments of the Edison Electric Institute and UTC, the Telecommunications Association, June 27, 1997, at iii. (hereinafter EEI /UTC Comments); Electric Coalition Comments at 10, 17.

4/ EEI/UTC Comments at 9.

5/ *See* Comments of American Electric Power Service Corporation, et. al., June 27, 1997, at 35-40 (hereinafter AEP Comments).

owners have market power in the market for pole attachments. That some cable operators, like Time Warner, are large companies hardly assists their ability to "negotiate" with the pole owners. As was the case in 1978, without regulation the utilities may offer cable operators pole space on a "take it or leave it" basis. 6/ And the only alternatives to use of the poles are much more expensive alternatives, if alternatives there be at all. 7/

The utilities' suggestion that negotiations cannot take place if the Commission continues its rate formula 8/ ignores the largely successful history of the last decade. Since the Commission's formula became set and no longer subject to significant dispute, the cable industry has been able to negotiate agreements with the pole owners largely without Commission intervention. Were the Commission to accede to the utilities' suggestions to "permit utilities to demonstrate that, due to the characteristics of its [sic] facilities or some other aspects of its operations, a rate higher than that prescribed by the formula

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6/ *See, e.g.*, H.R. Rep. 95-721, 95th Cong. 1st sess. 3 (1977).

7/ In a truly shameless exhibit that purports to contain economic analysis, the Reed Consulting Group contends that pole users have a "myriad of alternatives to a utility's poles or conduits . . . ." AEP Comments, Ex. 1 at 42. The authors of the Report suggest that cable operators are like advertisers who desire to lease space on the outside of city buses -- which are analogized to utility poles. *Id.* at 43. Indeed, the authors claim that "the bargaining position held by the electric utilities is actually far less favorable than that of the city." *Id.* If the Reed Consulting Group cannot recognize the distinction between the open market in advertising and the monopolized market in pole ownership, there is little sense in further debate.

8/ Electric Coalition Comments at 17.

nevertheless complies with the statute," 9/ one can only imagine the increase in controversy and the corresponding number of complaints before this Commission. Indeed, we can envision few agreements being reached without the Commission's direct assistance in such a situation.

Naturally, all of the utilities' proposals for flexibility in the manner in which the formula is applied would work in their favor. They demand the right to add more capital and expense accounts and to rely on various sub accounts and internal accounting where it suits their interests. EEI suggests that those utilities that have information on the number of poles they have that are less than 30 feet long should be able to use that information -- without acknowledging that only utilities that could benefit from relying on such information to justify higher rates would disclose it. 10/ In fact, EEI goes so far as to suggest that the utilities be permitted to submit "cost studies to support the allocation factors [the utilities] may individually use or propose." 11/ And AEP urges the Commission to permit utilities to conduct cost studies to determine the replacement costs of conduit. 12/ Yet the utilities resist additional analyses that would permit more accurate determination of costs to the benefit of the attaching cable operators. None of the commenting

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9/ *Id.* at 15.

10/ EEI/UTC Comments at 27.

11/ *Id.* at 41.

12/ AEP Comments at 94.

utilities, for example, would propose to allow any cable operator to obtain information from them regarding the actual percentage of non-pole related hardware and appurtenances contained in their pole accounts. Indeed, the utilities argue that the Commission should continue to rely on a 15 percent deduction from the pole line account, 13/ despite evidence that that deduction understates the investment in non-pole related items. 14/

It cannot escape the Commission that all of the utilities' "refinements" to the formula are one-sided and utterly at odds with the congressional admonition -- still standing -- that pole attachment rate regulation is to be "simple and expeditious." 15/ The Commission should reject the utilities' proposals to complicate pole attachment regulation by adding scores of additional calculations, by relying on unpublished, internal data and studies, and by giving utilities discretion as to how they calculate their costs.

B. The utilities Have Not Adequately Supported Their Proposals

Throughout their calls for changes in the Commission's established formula, the utilities make bald assertions of fact that are wholly unsupported, and in many cases contradictory. For example, there is no record support for the assertions: (1) that electric utilities usually are assigned 7.5 feet on a jointly used

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13/ *See, e.g.*, Electric Coalition Comments at 45;

14/ *See* Time Warner Comments at 21-22.

15/ S. Rep. No. 95-580, 95th Cong. 1st Sess. 21 (1977).

pole; 16/ that cable television uses the 40 inch safety space for attachments of power supplies, repeaters, amplifiers, guy attachments, and splitter boxes; 17/ that an average of four feet of sag must be anticipated to meet the NESC's 15.5 foot street clearance requirement; 18/ that "very few 30-foot joint use poles [are] deployed by electric utilities," 19/ and so forth. Moreover, the utilities have widely differing -- though all unsupported -- estimates of the amounts of various investment and expense accounts that they assert should be included in the formula. All in all, the utilities have given no basis for the Commission to accept any of their proposals.

16/ Electric Coalition Comments at 31.

17/ *Id.* at 39. Indeed, this statement is plainly incorrect and would violate the NESC §§ 235C, 238

18/ AEP Comments at 50 & n. 117. The utilities' estimate that 50 inches of sag must be accommodated is based on the completely unsupported assumptions that the average span length is between 200 and 250 feet and that the average cable type is between 200 and 300 pair. Moreover, the basis of the sag calculations is unexplained, including the wind and ice loading assumptions. As explained in the Statement of Kim Reid, Attachment A to the Comments of Time Warner in this rulemaking proceeding, the NESC requires accommodation of different amounts of sag depending on the region of the country, and the average span length is 150 feet.

19/ AEP Comments at 57. This assertion is contradicted by record evidence submitted both by Time Warner and by NCTA in their Comments. See Time Warner Comments at 17-19 and Attachment A; Comments of the National Cable Television Association, et al. June 27, 1997, at 15-16.

C. The Commission Should Reject the Utilities' Proposals to Raise Pole Attachment Rates.

The utilities make a number of specific proposals with the intention of raising cable operators pole attachment rates. These proposals should be rejected.

1. Removal of 30-foot poles.

Although they generally support the proposal made in the "Whitepaper" submitted earlier in this docket by several utilities that 30-foot poles be removed from Account 364 in determining average pole investment, some of the utilities confirm that the information on such poles is not present in the records of all utilities. 20/ More importantly, the utilities have submitted no evidence to support their assertion that 30 foot poles are not used for cable attachments, and there is considerable evidence already in the record that they are. 21/ Nor have the utilities grappled with the fact that there is no more reason to exclude poles 30 feet and shorter than there is to exclude the more expensive poles 50 feet and longer. 22/ There is no reason for the Commission to permit the utilities to rely on their internal records to exclude poles that are 30 feet and shorter from the formula.

20/ *See, e.g.*, Comments of EEI/UTC at 27 ("*some* utilities maintain separate records for poles that are 30 feet or less in height")(emphasis added).

21/ Comments of Time Warner at 18.

22/ *See id.* at 18.

2. Additional Investment and Expense Accounts

Several of the utilities propose that a number of additional investment and expense accounts be added to the rate formula. But nowhere do the utilities adequately support their proposals, and the utilities' estimates are by no means consistent. For example, without any support, the Electric Coalition states that six percent of Account 368 is "directly attributable to lightning arresters"; 23/ Ohio Edison and AEP say five percent; 24/ EEI says two percent. 25/ None of the utilities, moreover, would allocate these lightning arresters over all the plant accounts that the lightning arresters protect. And none of the utilities suggests that corresponding adjustments be made to deduct those portions of account 364, over and above the Commission's 15 percent deduction, that consist of items that are not pole related. All of utility proposals for increasing the amount of investment and expense are unsupported and one-sided.

3. Net Salvage and Gross Investment

Many of the telephone utilities argue that, instead of adopting its proposal for the treatment of net salvage, the Commission should allow utilities to use gross pole investment numbers. Frankly, so long as the Commission's formula recognizes that the reason for allowing either method is that the utility has

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23/ Electric Coalition Comments at 48.

24/ Ohio Edison Comments at 27; AEP Comments at 61..

25/ EEI/UTC Comments at 40.

already largely (if not fully) recovered its pole investment, Time Warner would not object to either method. In other words, it is important that any utility using either method not be permitted to recover further cost of money or federal taxes. If a utility chooses to use gross investment, therefore, we would not object so long as the utility did not include any carrying charge component for return or federal taxes. Moreover, of course, any utility that uses a gross book method must adjust the elements of the carrying charge, such as depreciation, general and administrative, and maintenance, to percentages of gross investment.

4. Forward-Looking or Replacement Costs

Several of the utilities argue for use of replacement costs. 26/ AEP goes so far as to suggest that the Commission set pole attachment rates based on "forward-looking costs," 27/ although without making clear whether it is using the term as a proxy for replacement costs or whether it means costs that would be incurred in constructing a utility infrastructure based on "the most efficient technology for reasonably foreseeable capacity requirements." 28/ But the Act requires that the maximum pole attachment rates be established according to the "actual capital costs of the utility," 47 U.S.C. § 224(d)(1), and try as they may, the

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26/ *See, e.g.,* Comments of SBC Communications, Inc. at 24.

27/ AEP Comments at 4.

28/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 685 (rel. Aug. 8, 1996), *vacated in part, Iowa Utilities Board v. FCC*, Case No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997).

utilities cannot transform either "replacement costs" or "forward looking costs" into "actual costs." Indeed, this Commission found in 1979 that replacement costs are not "reflective of actual costs incurred." 29/ Anything in excess of actual costs would violate the statutory prescription. Moreover, any effort to establish costs through cost studies or similar mechanisms would violate Congress' prescription that the regulatory mechanism be simple and expeditious, 30/ and its admonition that "[s]pecial accounting measures or studies should not be necessary." 31/

5. Conduits

The electric utilities argue that (1) their cost information on conduits is "old and incomplete," 32/ and that (2) urban and suburban conduit should be treated differently, although the utilities also state that they do not have records of their embedded urban conduit costs, 33/ The short answer is that the utilities do not make a persuasive case that their embedded cost records will not allow application of the Commission's formula. Their assertions are unsupported and unexplained. Nor is there any reason to try to separate the costs of urban and suburban conduit, any more than their is a reason to separate the costs of

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29/ *In re. Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, 65 (1979).

30/ S. Rep. No. 95-580, supra, at 21.

31/ *Id.* at 20.

32/ AEP Comments at 83.

33/ Electric Coalition Comments at 66

different size utility poles. Because the costs of all conduit are properly averaged, whether the utilities have records that would allow the separation of the costs of urban and suburban conduit is irrelevant.

The electric utilities also argue that embedded costs are inappropriate to use in determining the maximum conduit rates because replacement costs are so much higher and urban conduit is largely depreciated. 34/ That conduit is old and largely paid for. of course, simply underscores the lack of justification for high charges to cable operators to use it. And when the conduit is replaced or supplemented, the costs of construction will be reflected in the rates then. There is no disadvantage to the utilities because any increased costs will then be recoverable in rates established based on the actual costs at that time.

Finally, the utilities' arguments that the Commission should not assume that electric utility conduit can be shared because it cannot be shared among electric and communications users is specious. 35/ Although we are not convinced that electrical and communications use of the same duct is impossible, the question is really beside the point. If a duct can be shared among different communications users, including cable, telephone, and the electric utility's own telecommunications affiliate -- as it can be, without dispute -- then the cable

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34/ *Id.* at 65-67.

35/ *See, e.g.*, AEP Comments at 83.

operator may not charged for 100 percent of the cost of the duct. The Act does not define "usable space" in terms of use for electric power purposes, but instead defines it in terms of "wires, cables and associated equipment." 47 U.S.C. § 224(d)(2). The Commission should presume that each duct is usable for at least three communications wires.

The question whether the Commission should assume that one duct in each bank of conduits is reserved for maintenance purposes continues to be controversial. As stated in our initial Comments, we are not convinced that utilities uniformly reserve a duct for that purpose, and there is no documented information in the record to support the proposition that such a reserve exists in all cases. We would accept the presumption that a utility actually does reserve a duct for maintenance only if the conduit use agreement contains binding language that requires the utility to make another duct available to the cable operator for maintenance purposes in all situations and that provides for reasonable damages in the event that a duct is not made available, except in situations involving catastrophic failure of the entire conduit system.

6. Picking and Choosing

A number of utilities request the Commission to permit them to pick and choose whether to use the costs called for in the FCC's methodology or some other numbers that the utility believes may be more accurate. For example, the Electric Coalition asks for the right "to add other capital accounts, including pole equipment accounts, to the formula to the extent that their system of accounts

differs from that discussed herein, or from the pole attachment formula." 36/ GTE argues that the Commission should permit utilities -- at their discretion -- to substitute their internal numbers for deferred taxes related to poles for the publicly available numbers relied on by the Commission. 37/ Both of these proposals are based on the utilities' desire to pick and choose what numbers to use. Clearly, the utility would not rely on numbers other than those specifically called for by the Commission's formula unless the other numbers would achieve a higher rate. In contrast, there is no mechanism for a cable operator to force a utility to disclose all internal records that could justify a lower rate than would be obtained from the Commission's formula. We do not recommend that the Commission complicate the methodology and procedure by allowing reference to internal company data by any party. 38/ The utilities' requests that they be allowed to pick and choose between the formula and their own internal data should be rejected.

36/ Electric Coalition Comments at 45.

37/ GTE Comments at 15.

38/ Use of internal data would be inconsistent with prior well-reasoned Commission decisions. *See. e.g., American Cablesystems of Florida, Ltd v. Florida Power & Light Co.* PA 91-0012, DA 95-1364 (rel. June 15, 1995)(desegregation of accounts not permitted); *Liberty TV Cable, Inc. v. Southwestern Bell Telephone Co.*, PA 80-0012 (rel. Sept. 22, 1983)(although refinements to formula could add accuracy, offsetting refinements would also have to permitted, adding complexity), *Television Cable Service, Inc. v. Monongahela Power Co.*, 48 R.R.2d 1259, 1267 (Com. Car. Bur.), *aff'd*, 50 R.R.2d 583(1981)(data should be derived from federal or state reports). It would also add significantly to the contentiousness of negotiations and the complexity of resolving disputes.

II CONCLUSION

The utilities have not justified the need to revise any of the settled aspects of the pole attachment formula. The Commission should resist the temptation to tinker with a formula that has worked well -- and required a minimum of Commission involvement -- over the past decade.

The several issues raised that have not been decided by Commission rulemaking order should be addressed and decided here. Where a utility has largely depreciated and paid for its pole plant or conduit, the Commission should adopt its proposal. In the alternative, we would not object to use by the utilities of gross investment numbers, so long as the utilities were not permitted at the same time to include any recovery of cost of capital or federal taxes (in recognition that the only reason for permitting use of gross numbers is that the plant is largely paid for) and the other carrying charge components are adjusted to reflect the use of gross numbers. The Commission should use its proposed conduit methodology, except that it should adopt a one-third duct convention and presume that a duct is used for maintenance only when the conduit agreement explicitly requires the utility to allow the cable operator to use a

duct for this purpose in all cases. The Commission should not increase the complexity of the formula in specifying what Part 32 Accounts should be included.

Respectfully submitted,

HOGAN & HARTSON

By: _____
Gardner F. Gillespie
Cindy D. Jackson

555 13th Street N.W.
Washington, D. C. 20004

Attorneys for Time Warner Cable

August 11, 1997

CERTIFICATE OF SERVICE

I, the undersigned do hereby certify that a copy of the foregoing Reply Comments of Time Warner Cable was mailed, postage prepaid by first class mail, this 11th day of August 1997, to the following:

Paul Glist, Esq.
John D. Thomas, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue N.W. #200
Washington, D. C. 20006

R. Michael Senkowski, Esq.
Robert J. Butler, Esq.
Bryan N. Tramont, Esq.
Wiley, Rein & Fielding
1776 K Street N.W.
Washington, D. C. 20006

David L. Swanson
Senior Vice President
Energy & Environmental Activities
Edison Electric Institute
701 Pennsylvania Avenue N.W.
Washington, D. C. 20004

Jeffrey L. Sheldon, Esq.
UTC
1140 Connecticut Avenue N.W. #1140
Washington, D. C. 20036

James D. Ellis
Robert M. Lynch
David F. Brown
175 E. Houston - Room 1254
San Antonio, TX 78205

Lori L. Ortenstone
525 B Street - Room 900
San Diego, CA 92101

Margaret E. Garber
1401 I Street N.W. #1100
Washington, D. C. 20005

Durward D. Dupre
Mary W. Marks
Jonathan W. Royston
One Bell Center - Room 3520
St. Louis, MO 63101

Rick Giannantonio, Esq.
Ohio Edison
76 South main Street
Akron, OH 44308

Shirley S. Fujimoto, Esq.
Christine M. Gill, Esq.
Thomas J. Navin
Catherine M. Krupka
McDermott, Will & Emery
1850 K Street #500
Washington, D. C. 20006

Walter Steimel, Jr., Esq.
Richard E. Jones, Esq.
Marjorie K. Conner, Esq.
Ronnie London, Esq.
Hunton & Williams
1900 K Street N.W. #1200
Washington, D. C. 20006

Daphene M. Jones